6

Office-Supreme Court, U. S.
FILED
AUG 20 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 260

ANN ARBOR PRESS, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE MEADER,
1001 National Bank Building,
Ann Arbor, Michigan;
EDWARD BROWN WILLIAMS,
412 Washington Building,
Washington 5, D. C.,
Counsel for Petitioner.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	3
(a) Conflict of Decisions	3
(b) Due Process Requires a Record of Jurisdictional Facts	5
(c) The Argument of Administrative Convenience is Without Validity	11
(d) The Doctrine of the Presumption of Regularity of the Acts of Public Officials is Inapplicable	13
(e) Burden of Proof	14
Conclusion	15
Appendix	16

Table of Cases

N.L.R.B. v. *Highland Park Manufacturing Company*, 71 S. Ct. 758	3
N.L.R.B. v. *Greensboro Coca Cola Bottling Company*, 180 F. 2d 840 (C. A. 4)	3
Red Rock Company v. *N.L.R.B.*, 71 S. Ct. 1017	5
N.L.R.B. v. *Red Rock Company*, 187 F. 2d 76 (C.A. 5)	5
N.L.R.B. v. *Indiana Electric Company*, 318 U. S. 9	6
Consumers Power Co. v. *N.L.R.B.*, 113 F. 2d 38	6
Schwegman Bros. v. *Calvert Distillers Corp.*, 71 S. Ct. 745	6
Morgan v. *U. S.*, 298 U. S. 468	8
Chicago Junction case, 264 U. S. 258	8
West Ohio Gas Co. v. *Public Utilities Commission*, 294 U. S. 63	9
Ohio Bell Telephone Company v. *Public Utilities Commission*, 301 U. S. 292	9

Page

Thomas v. *Gaskill*, 315 U. S. 442 14
KVOS v. *Associated Press*, 299 U. S. 269 14
Magnolia Petroleum Co. v. *N.L.R.B.*, 112 F. 2d 545 14

STATUTES

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Sup. III, Sec. 151 et seq.:
Sec. 9 (f), (g), (h) 2, 3, 4, 7, 11, 14
Sec. 10 (a), (b) 5

Administrative Procedure Act, as amended, 60 Stat. 237, 5 U.S.C., Sec. 1001 et seq.:
Sec. 7 (c) 14
Sec. 7 (d) 10
Sec. 10 (e) 2, 10

MISCELLANEOUS

Corpus Juris Secundum, Federal Courts—Jurisdiction 10
American Jurisprudence, Vol. 54, p. 653 and Section 139 ..... 10, 14
Brief of N.L.R.B. in opposition to Petition for Certiorari in *Red Rock Company* v. *N.L.R.B.*, No. 695, October Term, 1950, p. 11 11
Petition for certiorari in *Highland Park Manufacturing Company* v. *N.L.R.B.*, No. 425, October Term, 1950, p. 7 12
Brief of N.L.R.B. in *Highland Park Manufacturing Company* v. *N.L.R.B.*, No. 425, October Term, 1950, Appendix II, p. 63 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

ANN ARBOR PRESS, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Ann Arbor Press, Inc.,[1] prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered March 23, 1951.

Opinions Below

The opinion of the Court of Appeals, as modified,[2] (R. 472) is reported at 188 F. 2d 917. The decision and order of the Board were entered July 8, 1949 (R. 60).

---

[1] Ann Arbor Press, Inc. was, by order of the Court of Appeals entered August 6, 1951, substituted for the original respondent, John W. Wiltsie, deceased (R. 496).

[2] On rehearing, the Court modified its opinion in a manner immaterial to the issues herein raised, by order dated June 1, 1951.

Jurisdiction

The judgment of the Court of Appeals was entered March 23, 1951, and was modified on June 1, 1951 (R. 496). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

Question Presented

May a Federal administrative tribunal make a final determination of the existence of its own jurisdiction without a factual record to support such conclusion?

Statute Involved

This case involves union compliance with Section 9 (f), (g), and (h) of the Labor-Management Relations Act, 1947 (61 Stat. 129, 29 U.S.C., Supp. III, 151, *et seq.*). The pertinent sections of that Act are set forth in the appendix, *infra*, pp. 16-19.

Statement

The charges of unfair labor practices, upon which the complaint of the National Labor Relations Board in this case was based, were filed February 6, 1948, by Local 20 of the International Brotherhood of Bookbinders, A. F. of L. (R. 17). At the opening of the hearing before the Trial Examiner, counsel for the General Counsel of the Board stated that he would offer no proof that the charging parties had filed the documents and performed the other acts required by section 9 (f), (g), and (h) of the Act (R. 78). Thereupon, counsel for the Ann Arbor Press moved to dismiss the complaint upon the ground that compliance with Section 9 (f), (g), and (h) was a condition precedent to the vesting of any jurisdiction in the Board to issue a complaint under Section 10 of the Act (R. 78). No proof of such compliance having been offered during the hearing,

this motion was renewed at the close of the General Counsel's case in support of the Board's complaint (R. 224-232) and again at the close of the entire record (R. 464).

The Trial Examiner held that the question of compliance was a matter for the internal administrative determination of the Board, and denied the motions to dismiss (R. 30).

Exception was taken to this holding of the Trial Examiner (R. 57). The Board, in its order, approved the ruling of the Trial Examiner, adding that inasmuch as the Board was "administratively advised" that the Union had fully complied with the filing requirements, the motion to dismiss was properly overruled (R. 62).

In granting enforcement of the Board's order, the Court of Appeals held that the Board was not required to allege and prove compliance with Section 9 (f), (g), and (h) of the Act and that compliance with those provisions was not jurisdictional (R. 481, 188 F. 2d 924). This ruling is contrary to the decision of this Court in *N.L.R.B.* v. *Highland Park Manufacturing Company*, 71 S. Ct. 758, decided May 14, 1951.

Reasons for Granting the Writ

(a) *Conflict of Decisions*

The Court below, in holding that Union compliance with Section 9 (f), (g), and (h) was not jurisdictional, did not discuss the principles involved but based its decision squarely upon the holding of the Circuit Court of Appeals for the Fourth Circuit in *N.L.R.B.* v. *Greensboro Coca Cola Bottling Company*, 180 F. 2d 840 (CA-4).

The *Greensboro* case held, first: That Union compliance with Section 9 (f), (g), and (h) is not jurisdictional; second: That the burden of proof of non-compliance rests with the employer, and, third: That the regularity of the Board's administrative determination of compliance is to be presumed.

This Court, in *N.L.R.B.* v. *Highland Park Manufacturing Company,* held the contrary. In that case, the Court said (and on these points there was no dissent):

(1) That the performance of the acts required by Section 9 (h) of the Act was a condition precedent to the vesting of *jurisdiction* in the National Labor Relations Board to issue a complaint of unfair labor practices where a labor organization was the charging party.

2. That the decision of the Board on the compliance of a charging labor organization was *subject to judicial review* at the instance of an employer in an unfair labor practice proceeding.

Since it was conceded in the *Highland Park* case that the Congress of Industrial Organizations had not complied with Section 9 (h), it was unnecessary for the Court to pass upon the question here presented, namely, whether facts must appear in the record of the Board to support its conclusion with respect to the compliance of a charging Union with Section 9 (f), (g), and (h) of the Act.

The decisions in the *Greensboro* case and the instant case present this dilemma: that, under *Highland Park* the order of the Board is invalid if the Union has failed to comply but, under *Greensboro,* the Board is permitted to foreclose all opportunity for the courts to look into the question of compliance, by excluding from the record all the facts relevant to it.

The case here presented provides this Court with the opportunity to clarify the confusion of these decisions, and to announce the logical doctrine that an administrative tribunal exercising quasi-judicial authority cannot validly act without facts of record to show its jurisdiction. There is no more basis for a judgment by the National Labor Relations Board without a record which shows its jurisdiction

than there would be for a judgment by a Federal Court without such a record.

Denial of application for Certiorari by this Court on June 4, 1951, in *Red Rock Company* v. *N. L. R. B.*, 71 S. Ct. 1017,[3] did not clarify this conflict of decisions. The conflict was not placed before the Court in that case. There the facts were essentially the same as here and the Court of Appeals for the Fifth Circuit followed the *Greensboro* doctrine. It is respectfully submitted, therefore, that the disposition of the *Red Rock* case was not consistent with the *Highland Park* decision. The opinion in the *Highland Park* case was dated May 14, 1951; Certiorari was denied in *Red Rock* 21 days later. The petitioner's brief, being filed April 24, 1951, before the *Highland Park* decision, did not discuss the inconsistency between the Court's view that the order involved would be invalid if the Union had not complied, and the Board's contention that the facts relating to such compliance were not properly a part of the record of the proceeding before it.

(b) *Due Process Requires a Record of Jurisdictional Facts*

This case raises a basic question of due process—

Whether the record of a federal administrative tribunal must contain the facts which show it has jurisdiction to hear and determine the controversy before it.

Under Section 10 (a) of the Act:

> "The Board is empowered, as hereinbefore provided, to prevent" unfair labor practices.

Under Section 10 (b) of the Act:

> "Whenever it is charged that any person" is engaging in unfair labor practice the Board "shall have power to issue . . . a complaint . . ."

---

[3] The opinion of the Court of Appeals for the Fifth Circuit is reported at 187 F. 2d 76 as *Red Rock Company* v. *N.L.R.B.*

Under these provisions the Board may not issue a complaint *sua sponte*, but only upon a charge filed with it. *N. L. R. B.* v. *Indiana Electric Co.*, 318 U.S. 9; *Consumer's Power Co.* v. *N. L. R. B.*, 113 F. 2d 38.

When the charge is filed by a labor organization no complaint may be issued unless *such labor organization and any national or international labor organization of which it is an affiliate* has filed with the Secretary of Labor (1) its Constitution and by-laws and certain reports (Section 9 (f)), (2) annual reports bringing up to date the information filed under subsection (f) (Section 9 (g)), and (3) unless each officer of all such organizations has filed the non-communist affidavit (Section 9 (h)).

The language of the law is clear and unambiguous. It requires no reference to legislative history, certainly not to the ex post facto report of a Committee—the Joint Committee on Labor Management Relations—which was created by the same 1947 amendments in which Section 9 was enacted. The reference by the Court of Appeals to this Committee's views was entirely misplaced. It is evident upon the face of the statute that the purpose of Congress was to deny the benefits of the Act to labor organizations which have not met the filing requirements of Section 9 (f), (g), and (h). No amount of analysis and construction of the language can derogate from that circumstance.

In the premises, therefore, it is appropriate to recall Mr. Justice Jackson's observation in his concurring opinion in *Schwegman Bros.* v. *Calvert Distillers Corp.*, 71 S. Ct. 745, 751, that—

> "Resort to legislative history is only justified where the fact of the Act is inescapably ambiguous, and then I think we should not be beyond Committee reports which presumably are well-considered and carefully prepared."

This principle is undoubtedly sound and seems peculiarly applicable to the situation with which we are here concerned.

In this case the Board's complaint is based upon a charge filed by a labor organization, the Bindery Workers' Union, Local 20, International Brotherhood of Bookbinders, A. F. of L. (R. 17).

Under the *Highland Park* decision compliance with Section 9 (f), (g), and (h) is jurisdictional and the Board's decision on compliance is subject to judicial review. It is therefore evident that compliance by three labor organizations would have to be shown:

1. Bindery Workers' Union, Local No. 20
2. International Brotherhood of Bookbinders
3. American Federation of Labor.

It is stated in the charge that the union filing the charge has complied and that "upon information and belief the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9 (f), (g), and (h) of the Act". (R. 17-19).

The Board said in its order that it was "administratively advised that the union has fully complied with the filing requirements" (R. 62).

It is submitted that these recitations do not establish the jurisdiction of the Board to proceed on the basis of a charge by Local No. 20. Certainly they provide no basis for judicial review as required by the *Highland Park* case. The Board itself said that compliance "is a matter for administrative determination and is not litigable by the parties" (R. 62). It did not, therefore, even purport to decide, in the exercise of its quasi-judicial function, whether

there had been compliance, as the Court of Appeals apparently thought it had done in the *Red Rock* case (187 F. 2d 78).[4] Even if the Board had purported in the instant proceeding to make such a judgment its action would, on its face, be invalid since it is evident that its reference to compliance was to the Bindery Workers' Union only and not to the A. F. of L. or to the International Brotherhood of Bookbinders. Indeed, at the time of its order (July 8, 1949) the Board held the view that compliance by the A. F. of L. was not required, as the *Highland Park* case shows. Its statement with regard to "Union" compliance is, therefore, quite meaningless insofar as the question of compliance by the A. F. of L. is concerned.

The comment of this Court in *Morgan et al.* v. *U. S. et al.*, 298 U. S. 468, 477, seems appropriate to this situation:

> ". . . all questions touching the regularity and validity of the proceeding before the Secretary are open to review . . . When the Secretary acts within the authority conferred by the statute his findings are conclusive . . . But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. *Otherwise the statutory conditions would be set at naught by mere assertion.*" (Emphasis supplied.)

Likewise, as Justice Brandeis stated in the *Chicago Junction* case, 264 U. S. 258, 264:

> "To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

---

[4] The Court referred to the statement of the Board that it had been "administratively advised" of union compliance as a part of "its findings and order."

Through Justice Cardozo this Court declared, in *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 69, that:

> "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."

Yet here, in effect, the Board is asking this petitioner and this Court to take the Board's word that the statutory conditions precedent to the vesting of its jurisdiction have been met.

We think that Justice Cardozo's remarks concerning the taking of judicial notice by an administrative tribunal in *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U. S. 292, are applicable here:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." (pp. 302-3).
>
> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to

them by law . . . All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." (pp. 304-5; citations omitted.)

Furthermore, under Section 7 (d) of the Administrative Procedure Act the transcript and documents "filed in the proceeding shall constitute the exclusive record for decision." This record is the basis for the court review provided by Section 10 (e). But if an administrative agency can make determinations of its own jurisdiction *outside the record* how can a reviewing court exercise its functions under Section 10 (e)?

Even if it were to be held that the record of a federal administrative tribunal need not contain facts showing the existence of jurisdiction, it is clear that federal courts do not possess such freedom from requirements of due process.

Probably one of the most clearly settled precepts of federal practice is the principle that the record of cases in federal courts must always contain the facts affirmatively showing the court's jurisdiction.

The presumption is always against the jurisdiction of a federal court, and facts must affirmatively appear that the court has jurisdiction or the suit is subject to dismissal at any stage of the proceedings.

A jurisdictional defect cannot be waived. Jurisdiction cannot be conferred by consent of the parties. The court, on its own motion, will dismiss the action whenever lack of jurisdiction is noticed (35 C. J. S. Federal Courts—Jurisdiction; 54 Am. Jur. 653).

It follows that the record of this court must contain facts showing the existence of its jurisdiction. But the record of this court is the record of the Board. This court has, and under the statute can have, no other record. Thus, even if the proceedings before the Board conducted by itself were free of the requirement that its record contain jurisdictional facts, it must be beyond question that once the Board seeks the aid of the federal judicial system to enforce its order it must then provide the court with a record upon which the court's jurisdiction can be founded.

(c) *The Argument of Administrative Convenience Is Without Validity*

In the *Greensboro* case Judge Parker expressed the view, which the Court of Appeals in the instant case approved, that Congress could not have intended to require a showing of compliance as a condition of valid action by the Board, for to do so "would greatly hamper the administration of the Act" (180 F. 2d 845).

The question of administrative inconvenience is not a part of the record in this proceeding and is, therefore, not properly before this Court. Nor is the "rather elaborate administrative machinery" which the Board states that it has set up to make "administrative determinations" dehors the record, of compliance with Section 9 (f), (g), and (h). See the Board's Brief in opposition to petition for Certiorari in *Red Rock Company* v. *National Labor Relations Board,* No. 695, October Term, 1950, p. 11.

Since, however, these administrative procedures have been discussed by the Board in this and other similar proceedings, we must point out that their existence tends strongly to nullify the argument of administrative convenience relied upon by the Courts of Appeals in the instant proceeding and in the *Greensboro* case.

Thus, it would appear that the introduction into the record of the information already collected in the Board's files or at its disposal might, in the ordinary case, show whether the jurisdictional conditions of filing had been met. It is difficult to see how such a requirement would hamper the administration of the Act in any respect whatsoever. The task of obtaining the necessary evidence, which seemed so formidable to Judge Parker, has, according to its own representations, already been performed by the National Labor Relations Board before the issuance of its complaint. If, in fact, there is substantial evidence of compliance in possession of the Board's Affidavit Compliance Branch, it would seem that the Board has little real basis for refusal to make that evidence a part of the record.

The Board said in its Petition for Certiorari in the *Highland Park* case that although the C.I.O. and A. F. of L. had filed the documents required by Section 9 (f), (g), and (h), "there is no assurance that they will continue to file the annual reports and affidavits required therein" (Petition, p. 7), and it showed, in its brief in that case before this Court, that it was quite common for unions to lapse in compliance in one respect or another (Brief, Appendix II, p. 63).

These difficulties of ascertaining compliance were, to be sure, set forth as an argument against a construction of the law to include parent labor organizations among unions who must file pursuant to Section 9. But they forcibly suggest to us that, in view of the emphatic purpose of Congress in enacting the filing provisions, it is essential that the maximum feasible assurance be given that there has, in fact, been compliance with such provisions.

In effect, the Board has gone outside the record to inject into its briefs self-serving statements, whose validity and effect have not been subjected to challenge, to create a

straw-man by magnifying all the possible difficulties or proof, so as to make it appear that establishing its jurisdiction of record would be extremely onerous. The sufficiency and admissibility of evidence of jurisdictional facts is not in issue here, since no proof whatever was offered. We believe the Court should decline to speculate on rulings on offers of evidence where none have been made. Since, however, this line of argument appeared to impress the Court of Appeals in the *Greensboro* case, we call attention to the fact that where the filing of papers is the matter to be proved, existing rules of evidence are quite liberal in authorizing such proof by duly authenticated copies and certificates of public officers.

(d) *The Doctrine of the Presumption of Regularity of the Acts of Public Officials is Inapplicable*

The Board and the Courts of Appeal have clearly misapplied the principle that the acts of public officials are presumed to be regular. This doctrine relates only to the performance of administrative or ministerial acts and not to the exercise of quasi-judicial authority by a tribunal of limited power. The jurisdiction of such a tribunal cannot be presumed.

The idea that the Board must be assumed to have ascertained that the law has been complied with is particularly lacking in persuasiveness in the light of the *Highland Park* case. There the Board had failed to require compliance by the C.I.O. parent union. Had this Court indulged in the presumption of compliance with law in that case the result would have been refusal to hear an appeal from the Board's order and, consequently, enforcement of an order which was invalid.

Yet the Courts of Appeals in this case and in the *Greensboro* case have set up just such a presumption. That it

is unsound is demonstrated by the fact that, as in the *Highland Park* case, at the time the orders in both cases were entered by the Board, it was the Board's view that, as a matter of law, Section 9 (f), (g) and (h) did not apply to the C.I.O. and the A.F. of L.

(e) *Burden of Proof*

The Circuit Court of Appeals, in the *Greensboro* case, seemed to hold that the burden was upon the employer to prove that the Board lacked jurisdiction by showing that the charging labor organization had not complied with Section 9 (f), (g) and (h).

The burden of proof always rests upon him who seeks the relief and initiates the proceedings. This is especially true where the jurisdiction of a Federal tribunal is concerned and where, as here, petitioner is both the complainant and the tribunal.

Section 7 (c) of the Administrative Procedure Act provides, in part:

> ". . . Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. . . ."

The burden of proof to sustain jurisdiction of a federal court is on the plaintiff or petitioner.

54 Am. Jur. Section 139
Thomas v. *Gaskill*, 315 U.S. 442
KVOS v. *Associated Press*, 299 U.S. 269

In *Magnolia Petroleum Co.* v. *NLRB*, 112 Fed. 2nd 545 at page 548 the Court held:

> "In its capacity as accuser, the Board under the genius of our institutions is held to the same burdens and obligations of proof as any other litigant who takes

the affirmative. It may not by accusing put the accused on proof. As accuser it must prove its charge."

Conclusion

This Court said in the *Highland Park* case that, in the event of a "dispute" whether the union had complied, if "the Board resolved that question in favor of the union, a different question would be presented." Such is the issue here. But there is no record on which such "dispute" could be resolved either by the Board or this Court.

It seems clear enough that the Court, by this language, did not contemplate that the Board should "resolve" such a "dispute" by ex parte action outside the unfair labor practice proceeding. A matter which can be determined in that manner by one party to a proceeding to which it relates can hardly be the subject of a "dispute."

In view of the considerations and arguments above set forth, it seems to us that the only sensible conclusion in this matter is that, as a condition precedent to the issuance of a valid complaint, the Board must make, on the basis of substantial evidence in its record, a finding of compliance by the charging union in order to provide an adequate basis for judicial review of its quasi-judicial order.

For these reasons, it is submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

George Meader,
1001 National Bank Building
Ann Arbor, Michigan

Edward Brown Williams,
412 Washington Building
Washington 5, D. C.

Attorneys for Petitioner.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Sup. III, Sec. 151, et seq., are as follows:

Information to be Filed by Unions

SEC. 9. • • •

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and *no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization* and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) *shall have prior thereto filed* with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

NOTE: Italics have been added by Respondent.

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws, showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

Failure of Union to File Information

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative

of any employees, no petition under section 9(e)(1) shall be entertained, and *no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it* and any national or international labor organization of which it is an affiliate or constituent unit *has complied with its obligation under this subsection.*

Members of Communist Party

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and *no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit* executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Prevention of Unfair Labor Practices and Issuance of Complaint

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

"(b) *Whenever it is charged* that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, *shall have power to issue* and cause to be served upon such person *a complaint,* stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed not less than five days after the serving of said complaint: * * *."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
Argument	3
Conclusion	5
Appendix	6

CITATIONS

Cases:

National Labor Relations Board v. *Greensboro Coca Cola Bottling Company*, 180 F. 2d 840	4
National Labor Relations Board v. *Highland Park Mfg. Co.*, 341 U. S. 322	4
Red Rock Company v. *National Labor Relations Board*, 341 U. S. 950	3, 4

Statutes:

National Labor Relations Act, as amended by Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*)	2
Section 8 (a) (1)	2
Section 8 (a) (3)	2
Section 9 (f)	3, 4, 6
Section 9 (g)	3, 4, 7
Section 9 (h)	3, 4, 8

In the Supreme Court of the United States

OCTOBER TERM, 1951

ANN ARBOR PRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 472-487) is reported at 188 F. 2d 917. The findings of fact, conclusions of law, and order of the Board (R. 60-73) are reported at 85 N.L.R.B. 58.

JURISDICTION

The judgment of the court below was entered on March 23, 1951 (R. 472). A petition for rehearing filed by the Board on April 12, 1951 (R. 487), urging amendment of the court's judgment insofar as it had altered the form of notice the Board's order required (R. 488-495), was granted

on June 1, 1951, along with the requested amendment (R. 496). The petition for a writ of certiorari was filed on August 20, 1951. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Supp. IV, 141 *et seq.*), are set forth in the Appendix, *infra*, pp. 6-8.

QUESTION PRESENTED

Whether, in an unfair labor practice proceeding against an employer, the Board must plead and prove the facts showing that the labor organization which instituted the charges has filed with the Secretary of Labor and the Board the documents required by Section 9 (f), (g), and (h).

STATEMENT

Upon the usual proceedings under Section 10 of the amended Act, the Board, on July 8, 1949, issued its decision and order. The Board's decision, the merits of which are undisputed here, shows that petitioner violated Section 8 (a) (1) and (3) of the Act by (1) discriminatorily replacing two employees for their supposed leadership of an economic strike, (2) discriminatorily discharging four employees for union membership and activities, (3) unlawfully interrogating its employees concerning union membership and activities, and (4) threatening to close its business if its employees organized (R. 64-69). The Board's order requires

cessation of the unfair labor practices, reinstatement of the unlawfully discharged employees with back pay, and the posting of appropriate notices (R. 69-73).

During the Board's hearing the trial examiner denied petitioner's motions for dismissal of the complaint on the ground that there was no proof that the union which had filed the charge (Bindery Workers Union, Local 20, International Brotherhood of Bookbinders, A.F. of L.) had complied with the filing requirements of Section 9 (f), (g), and (h) of the Act. (R. 78, 79, 225, 234). Approving these rulings, the Board held that compliance was "a matter for administrative determination" and that it was "administratively advised that the Union [had] fully complied with the filing requirements" (R. 62).

In granting enforcement of the Board's order,[1] the court below rejected, along with other contentions which are immaterial here, petitioner's argument that the Board was required to allege and prove for the record in its unfair labor practice proceeding that the charging union had filed with the Board and the Secretary of Labor the various documents required by Section 9 (f), (g), and (h) (R. 481).

ARGUMENT

As petitioner recognizes (Pet. 5), the precise question raised here was presented by the petition for certiorari denied in *Red Rock Company* v. *National Labor Relations Board*, 341 U.S. 950, No.

[1] In its original decision, the court modified the form of notice required by the Board's order. On the Board's petition for rehearing, this modification was withdrawn and the Board's order enforced in full (R. 496).

695, 1950 Term. In the brief opposing certiorari in the *Red Rock* case, to which the Court is respectfully referred, we pointed out that the three courts of appeals which have considered this question—the Court of Appeals for the Fourth Circuit, in *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, as well as the court below and the Court of Appeals for the Fifth Circuit in *Red Rock*—have all agreed that nothing in the Act requires the Board to plead and prove a charging union's compliance with the filing requirements of Section 9 (f), (g), and (h). We submit that the reasons set forth at length in the opinion below (R. 474-481) and in our brief in opposition in the *Red Rock* case, pp. 10-13, demonstrate the correctness of this uniform conclusion, and that the present petition, like the one in the *Red Rock* case, poses no issue warranting review by this Court.

Petitioner's assertion (Pet. 3) of a conflict between the decision below and *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U.S. 322, is plainly erroneous. Nothing in the *Highland Park* opinion suggests that compliance is a jurisdictional matter upon which the Board has the burden of proof; no such question was presented to or passed upon by the Court. As has been noted, petitioner's jurisdictional contention was presented by the petition for certiorari in the *Red Rock* case, in which certiorari was denied after the *Highland Park* decision.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MOZART G. RATNER,
Assistant General Counsel,
MARVIN E. FRANKEL,
Attorney,
National Labor Relations Board.

SEPTEMBER, 1951.

APPENDIX

The pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are as follows:

* * * * *

SEC. 9. * * *

* * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and

agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary

of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under 9(e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 966477 199